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TAB 4

The Six-Minute Criminal Court Judge 2020

Issues in Jury Selection and Management: A Practitioner's Guide

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Issues in Jury Selection and Management:

A Practitioner's Guide[1]

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I. Introduction

The selection of a criminal jury in the Superior Court of Justice is often a procedurally complicated and cumbersome affair. Not only are there complexities arising from the congregation of a large group of the public in response to jury summonses, the law of jury selection is complex, and the realities of the process may disallow timely legal research on issues as they arise in the midst of a selection process. Failure to comply with the statutory procedures can result in appellate reversal if the jury is not properly constituted.

The complexities within the jury selection process have been amplified with the introduction of Bill C-75, which has substantially amended the jury selection procedures. The significant changes to jury selection following Bill C-75 have resulted in conflicting and complex case law, with judges across the province of Ontario differing in their views on whether the amendments are constitutional or whether they apply prospectively.

In this paper, we canvass a number of common issues arising in jury selection to assist in their identification and to permit a timely response.[4] We also provide an overview of some of the key changes to jury selection following Bill C-75, in addition to summarizing the leading case law on these issues.

II. Amendments to the Ontario *Juries Act*

As a preliminary matter, it is worth noting that on May 29, 2019, the *Protecting What Matters Most Act (Budget Measures)*[5] came into force. This *Act* made a number of amendments to the Ontario *Juries Act*.[6] Following the amendments, jury rolls are now compiled from a jury source list created annually by the Minister of Health and Long-Term Care.[7] In other words, the most recent OHIP records will now be the database from which jury rolls are compiled, rather than the previous method of compiling jury rolls from the Municipal Property Assessment Corporation records ("MPAC").

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[4] For further reference, we recommend Michelle Fuerst & Mary Anne Sanderson, *Ontario Courtroom Procedure*, 3rd ed. (Markham: LexisNexis Canada Inc., 2012), which comprehensively addresses the jury selection issues discussed in this paper and many others [now in its 4th edition, published October 2016; references are to the 3rd edition]. See also Justice Joseph Di Luca, *Replacing Jurors and Other Problems in Jury Selection* (Paper presented at the National Criminal Law Program, July 2017, Vancouver, BC); Fraser Kelly, *Juror Misconduct During the Trial* (Paper presented at the National Criminal Law Program, July 2017, Vancouver, BC).

[5] *2019,* S.O. 2019, c. 7.

[6] R.S.O. 1990, c. J.3.

[7] *Juries Act*, at s. 4.1(1).

The previous system gave rise to several concerns regarding the representativeness of jury rolls compiled from MPAC records.[8] The amendments are expected to have a positive impact in terms of jury representativeness generally, particularly by increasing the number of Indigenous and non-white people on the jury rolls.[9] It is expected that a broader cross-section of the adult population will be included in jury rolls compiled from OHIP records than the jury rolls previously compiled from the MPAC records, which prioritized property owners and likely excluded many renters, boarders, students, seniors and low income people from jury service.[10] The change is expected to be an effective way to enhance broad representativeness of jury rolls and jury panels.

There have also been amendments to the secrecy of the jury roll and jury panel. Prior to the 2019 amendments, the jury roll and every list containing the names of the jury drafted for any panel would be kept under lock and key by the sheriff until ten days before the sitting for which the panel had been drafted. During that ten-day period, "litigants or accused persons or their solicitors", upon request and payment, could inspect a copy of the jury roll and panel list. Following the amendments, the Jury Sherriff is now required to keep the jury source list and jury roll in a secure location or database and must ensure it is not disclosed unless required by law.[11] The jury panel list, however, can be disclosed within ten days before the first sitting of the court for which the panel has been selected upon request and payment.[12]

III. Selection of 13 or 14 Jurors

Typically, a jury consists of 12 jurors. In October 2011, Parliament amended the *Criminal Code*[13] to permit the empanelment of 13 or 14 jurors in order to prevent a mistrial during lengthy trials. The amendment was made to reduce the risk that the jury would fail to maintain a minimum of 10 jurors, thus resulting in a mistrial (though such trials can now continue judge-alone on consent – see *infra* Continuing a Trial Judge-Alone Where Jury Quorum Lost).

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[8] See e.g. Ebyan Abdigir et al., "How a broken jury list makes Ontario justice whiter, richer and less like your community", *Toronto Star* (16 February 2018).
[9] *R. v. Campbell*, 2019 ONSC 6285, at para. 65.
[10] *Campbell*, at para. 95; see also Abdigir et al.
[11] *Juries Act*, at ss. 4.1(3), 11, 11.1(1).
[12] *Juries Act*, at s. 18(3). It is worth noting that security issues may arise from allowing access to the jury panel list. In such circumstances, the Crown or the court on its own motion may seek an order limiting access to the jury panel list under s. 631(6) of the *Criminal Code*. However, such an order must be sought at least ten days in advance of jury selection to ensure there is no opportunity for the jury panel list to be disclosed. It is also worth noting that Schedule 12 of Bill 161, *Smarter and Stronger Justice Act*, 2019, seeks to amend the Ontario *Juries Act* respecting the addresses of persons listed on the jury panel. It seeks to amend s. 15(3) of the Ontario *Juries Act* by removing the addresses of all persons selected to be on a jury panel list, unless the court orders that disclosure include the address. Bill 161 carried its First Reading on December 9, 2019.
[13] R.S.C., 1985, c. C-46.

Section 631(2.2) provides that the judge presiding at the jury selection can order that 13 or 14 jurors, rather than 12 jurors, be sworn. This order must be made before jury selection begins. The 12, 13 or 14 jurors who are sworn and present at the commencement of the evidence on the merits shall be the jury. However, s. 652.1(2) provides that only 12 jurors can deliberate and return a verdict. Therefore, after the trial judge has charged the jury, and 13 or 14 jurors remain, the numbers of all the jurors are placed back into the drum. Two juror numbers are drawn from the drum and those two jurors are discharged, leaving 12 jurors to deliberate.

The statutory test for making an order under s. 631(2.2) is whether the appointment of additional jurors is "advisable in the interests of justice", which has been characterized as "broad and discretionary".[14] If the case is judged to be sufficiently lengthy and complex, it appears that it may be difficult for counsel to resist an application for a s. 631(2.2) order. In *R. v. Daley*,[15] counsel for two of five co-accused unsuccessfully opposed a Crown application, raising concerns about inconvenience caused to the additional members of the public.[16]

IV. Selection of Alternate Jurors

The procedure for selecting alternate jurors is governed by s. 631(2.1) of the *Criminal Code*. If a trial judge considers it advisable in the interests of justice, the judge may order that one or two alternate jurors are selected. Alternate jurors can still be selected even where an order has been made to sit 13 or 14 jurors.

These alternate jurors are discharged at the commencement of the presentation of the evidence on the merits. That means the alternate jurors should sit for the opening instructions of the judge and the Crown's opening address. In accordance with s. 642.1 of the *Criminal Code*, there is no jurisdiction to keep alternate jurors throughout the trial.

The selection of alternate jurors ensures that the trial starts with a full complement of jurors, as seated jurors sometimes raise issues requiring excusal between the completion of jury selection and the start of the trial – particularly if there is a weekend or longer delay between them.[17]

[14] *R. v. Jaser*, 2014 ONSC 7528, at para. 4 (appeal allowed on other grounds: *R. v. Esseghaier*, 2019 ONCA 672).
[15] 2015 ONSC 7264.
[16] *R. v Daley*, 2015 ONSC 7264, at para. 12.
[17] See e.g. *R. v. Punia*, 2016 ONSC 475, at para. 4.

V. Excusal of Prospective Jurors

There are requirements that a prospective juror must meet in order to be eligible to serve on a jury. In addition to the eligibility requirements, there are also two distinct procedures followed in Ontario for the excusal of prospective jurors. First, an out-of-court process takes place pursuant to the provisions of the *Juries Act*. Second, there is an in-court process pursuant to the provisions of the *Criminal Code* that also incorporates provincial law.

a. Juror Eligibility

Section 626 of the *Criminal Code* incorporates provincial juror eligibility legislation into criminal jury proceedings constituted under the federal statute. In Ontario, the relevant provincial law is the *Juries Act*.[18]

Pursuant to the *Juries Act*, to be eligible for jury service in Ontario, a person must be resident in the province, be a citizen of Canada, be at least 18 years old at the beginning of the year the jury is selected, and speak, read and understand English or French.[19] In the 2019 amendments to the *Juries Act*, the statutory eligibility requirement that a juror reside in the "county" of the trial was eliminated.[20]

A person who attended court (or a coroner's inquest) in response to a juror summons in the three preceding years is ineligible for jury service, as are persons who are physically or mentally unable to discharge the duties of a juror and cannot be reasonably accommodated in such a way as to allow them to perform those duties.[21] A person summoned as a witness, is likely to be a witness, or has an interest in the proceeding is also ineligible to serve as a juror during any sitting at which the case might be tried.[22]

Persons convicted of offences that may[23] be prosecuted by indictment who have not been pardoned or granted a record suspension are also ineligible.[24]

In addition to the forgoing disqualifications, the *Juries Act* defines categories of persons engaged in certain lines of employment as ineligible for jury service.[25] Elected officials, judges, lawyers, students-at-law, medical practitioners and coroners are ineligible. A broad law

[18] *R. v. Montague*, 2010 ONCA 141, at paras. 30-35.
[19] *Juries Act*, at s. 2.
[20] *Juries Act*, at s. 2.
[21] *Juries Act*, at s. 4(a).
[22] *Juries Act*, at s. 3(3).
[23] Prior to 2010, only persons convicted of indictable offences, who had not been pardoned, were ineligible: see *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777, at para. 46.
[24] *Juries Act*, at s. 4(b); *Criminal Code*, at s. 638(1)(c).
[25] *Juries Act*, at s. 3(1).

enforcement exception also makes ineligible "every person engaged in the enforcement of law". The subsection gives specific examples of persons engaged in law enforcement which include police officers, jailers, and firefighters.

Judges may receive communications from prospective jurors (see *infra* Out-of-Court Excusal of Jurors) in occupations adjacent to the exclusions, such as parking enforcement officers or law clerks, suggesting that they are ineligible to serve as jurors. While the *Juries Act* provides a broad scope of ineligibility, the eligibility of jurors tangentially covered by the law enforcement exception is likely properly canvassed in court with the submissions of counsel.[26]

In *R. v. Zvolensky*[27], it was discovered post-conviction that one of the jurors in a murder trial had volunteered as an auxiliary member of the Hamilton Police Service for five years, ending his service 11 years before the trial. The appellants argued this juror was ineligible to serve, and as a result, a new trial was required. The Court of Appeal for Ontario found that the law enforcement exclusion in the *Juries Act* only applied to individuals currently working in these roles.[28]

In *Re: Jury Panel Member No. 407*,[29] the court received a letter from a prospective juror requesting that she be removed from the panel as she had recently become employed as a probation officer. Justice Ellies found that a probation officer is a "person engaged in the enforcement of law", thus ineligible for jury service. A contextual analysis of the statutory framework for probation officer duties informed the court's conclusion.

b. Out-of-Court Excusal of Jurors

In accordance with the 2019 amendments to the Ontario *Juries Act*, the Minister of Health and Long-Term Care must prepare a "jury source list" before June 1 of each year.[30] It must list all statutorily eligible persons who are registered under the OHIP regime.[31] By September 15 of each year, the local sheriff in a "jury area"[32] shall determine the number of prospective jurors required

[26] See for example, *Page (Trustee of)*, 2002 CanLII 14393 (Ont. S.C.). Himel J. found that a trustee in bankruptcy/court appointed receiver was an "officer of a court of justice" within the meaning of the *Juries Act*: para. 1. Himel J. limited the exemption to "licensed trustees in bankruptcy who are actively engaged or receivers who are actively engaged, and does not apply to their employees, partners, associates or agents": para. 26. In *R. v. A.M.*, 1994 CanLII 1680 (Ont. C.A.), the Court of Appeal for Ontario held that a juror who was on the Board of Governors of Crimestoppers was not "engaged in the enforcement of the law".
[27] 2017 ONCA 273.
[28] *Zvolensky*, at para. 192.
[29] 2019 ONSC 6067.
[30] *Juries Act*, at s. 4.1(1)
[31] *Juries Act*, at s. 4.1(4)
[32] Jury areas are to be established by regulation. No such regulation appears to be in force at the time of writing.

for the following year and send jury questionnaires to randomly selected prospective jurors.[33] Upon return of the questionnaires, the Jury Sheriff will prepare the jury roll for the year and certify it, notifying a judge of the Superior Court.[34] When a jury pool is required, a judge of the Superior Court may issue precepts to the Jury Service, and the Jury Sheriff will summons jurors to appear at a designated date.[35] See *R. v. Hoffman*[36] for a discussion of the procedure followed prior to the 2019 amendments.

Pursuant to the provisions of the *Juries Act*, prospective jurors can apply to be excluded from jury service out-of-court. Section 23(3) provides that a prospective juror summonsed for a sitting may make application to the sheriff for excusal, which can be determined by any judge of the Superior Court before the day of attendance, or the presiding judge on the day of attendance. This may be the trial judge, but practice varies by jurisdiction.

There are four statutory grounds for out-of-court exclusion:[37]

1. If service as a juror is incompatible with religious practices or belief
2. Illness
3. Serious hardship or loss to the prospective juror or others
4. The prospective juror does not reside within a reasonable distance of the place where the trial is to occur

The 2019 amendments to the *Juries Act* eliminated the former distinction in s. 23 between excusal of prospective jurors and postponement of the summons to a sitting later in the year (in the case of illness or hardship). However, the authority to "release from or postpone service of any number of jurors summonsed for the sitting" remains in s. 24. The inclusion of residence outside of a "reasonable distance" from the trial location is new in the amendments and appears to replace the former eligibility requirement that the juror reside in the "county" of the trial.

Examples of reasons cited in "serious hardship" applications include pre-booked vacations, travel or transit difficulties in regions with poor public transit, or employment obligations. The judge reviewing the application will exercise their discretion in determining whether the juror should be excused.

[33] *Juries Act*, at s. 6.
[34] *Juries Act*, at ss. 7-9.
[35] *Juries Act*, at ss. 12, 17.
[36] 2019 ONSC 2355, at paras. 10-16.
[37] *Juries Act*, at s. 23.

Mere inconvenience will not be sufficient to be excused. As Justice Hill noted in *Re s. 39 Juries Act Contempt Inquiry*:[38]

> Undoubtedly, a summons to jury service and participation in the trial process will, more or less, cause inconvenience and perhaps financial loss. This is inevitably a cost of public duty. As recognized by Lord Devlin, quoting *Blackstone's Commentaries on the Law of England* (1902), Book 4, at p. 1735, "delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters" (The Hamlyn Lectures (8th series), *Trial By Jury* (London: Stevens and Sons Ltd., 1956) at p. 165). To similar effect is the observation of Vaillancourt J. in *R. v. Tele-Mobile Co*. (2006), 81 O.R. (3d) 745 (Ct.J.), at para. 68, that" jurors are obligated to tolerate a certain degree of inconvenience in performing their duty in the criminal justice system, and that it is only at the point of serious hardship or personal hardship that warrants that a juror may be excused from their duty.

In the case of special panels summonsed for trials that are expected to be very lengthy (see *infra* Special Panels and Jury "Purges"), potential jurors may receive special notification about the expected length of the trial. The court may invite correspondence about any serious hardship that may arise as a consequence of a lengthy trial.

In *R. v. Montague*,[39] some prospective jurors sent letters seeking excusal from jury service. The prospective jurors were released or had their service postponed by the trial judge or another Superior Court judge pursuant to the out-of-court process. Most were "medical situations, but some were holidays".[40] The two accused argued on appeal that the trial judge failed to comply with the provisions of the *Criminal Code* by excusing persons from the jury panel without the accused being present. The Court of Appeal rejected the appellants' argument. The court observed that s. 626(1) of the *Criminal Code* defines a qualified juror as one who is summonsed in accordance with the applicable provincial law. Therefore, prospective jurors were properly excused in accordance with the *Juries Act*.

c. <u>In-Court Excusal of Jurors</u>

Section 632 of the *Criminal Code* codifies the pre-screening of jurors before the commencement of the trial. It was enacted following the approval of pre-screening by the Court of Appeal for Ontario in *R. v. Hubbert*[41] and the Supreme Court of Canada in *R. v. Sherratt*.[42] Section 632 reads as follows:

> **632.** The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant

[38] 2011 ONSC 1105, at para. 37.
[39] 2010 ONCA 141.
[40] *Montague*, at para. 34.
[41] (1975), 11 O.R. (2d) 464 (C.A.).
[42] [1991] 1 S.C.R. 509.

> to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of
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> > (*a*) personal interest in the matter to be tried;
> >
> > (*b*) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or
> >
> > (*c*) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

The juror excusal procedure varies according to the preferences and practices of each individual judge. Some judges prefer to have prospective jurors raise any issues after their number is selected and they are brought forward. Others prefer what is sometimes referred to as a jury "purge", wherein reasons for possible excusal are identified by the trial judge and jurors are invited to come forward to address the court if they wish to seek excusal (jury purges are explained further in the next section). Both forms of juror pre-screening are contemplated by s. 632 ("whether or not the juror has been called pursuant to subsection 631(3) or (3.1)").

Section 632 prescribes four statutory grounds for excusal: personal interest, relationship with a party, personal hardship, or any other reasonable cause. In *R. v. Betker*,[43] Moldaver J.A. held that the words "any other reasonable cause" found in s. 632(c) were broad enough to include matters of partiality not specifically mentioned in s. 632. For example, Moldaver J.A. recognized that some prospective jurors who had been the victim of crimes similar to those before the court should be excluded on the basis of personal hardship pursuant to s. 632(c). He notes, at pp. 342-43:

> I readily acknowledge that there may be some prospective jurors, who, by virtue of their own victimization, remain psychologically scarred and traumatized. To require such individuals to relive the horror of their own personal experiences through the eyes of another complainant would be nothing short of inhuman. The same holds true for those closely associated with such victims.
>
> In order to avoid this, trial judges would be well advised to alert the entire panel to the nature of the charges and invite those prospective jurors who would find it too difficult to sit as a juror to identify themselves. Once identified, the prospective juror should be excused on account of personal hardship in accordance with s. 632(c) of the *Criminal Code*. No follow-up questioning should be undertaken as this could lead to unnecessary and unwarranted embarrassment.

Pre-screening typically occurs after the accused has been arraigned and the judge has delivered introductory remarks to the panel. Arraignment serves as a useful method for identifying personal interest and relationships conflicting with the impartial role of a juror, as the accused, complainants and relevant locations are typically identified.

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[43] (1997), 33 O.R. (3d) 321 (C.A.).

The names of all anticipated witnesses should also be provided to the panel, either by reading the list aloud or by presenting it in some other form. For example, in *R. v. Valentine*,[44] Justice Pardu, as she then was, directed the Crown to prepare lists of proposed witnesses for delivery to panel members after their arrival at the courthouse, thereby enabling them to identify a close connection to any listed person. The lists were to be left in the courtroom after the jurors departed.

VI. Special Panels and Jury "Purges"

A special panel refers to summonsing a larger group of prospective jurors than are summonsed in the ordinary course in a particular jurisdiction. It is more a descriptive term than one laden with statutory meaning. Under s. 12 of the *Juries Act*, a judge of the Superior Court of Justice may issue precepts for "such number of jurors as the local sheriff has determined as the number to be summoned or such greater or lesser number as in the judge's opinion is required." The judge can also require that the sheriff summons more than one set of jurors in accordance with s. 13.

A special panel is often summonsed where there is a concern that a full jury may not be empaneled from a regular-sized panel. This concern might arise if one or more of the following factors are present: where there are a number of co-accused; where the trial is expected to be lengthy (thus leading to an increased number of jurors seeking excusal for hardship reasons); where a challenge for cause is expected; or where more than 12 jurors are to be selected.

For example, in Brampton, the typical jury panel will consist of 200-300 jurors. In *Valentine*, 1000 prospective jurors were summonsed for the trial of three co-accused in relation to the death of Jane Creba in Toronto on Boxing Day 2005. In *R. v. Pickton*, 2006 BCSC 1799, 600 jurors were summonsed for the trial of Robert Pickton. In *R. v. Sandham*, 2008 CanLII 84096 (Ont. S.C.), 2000 prospective jurors were summonsed for the trial of six accused in relation to the 2006 murders of eight members of the Toronto Bandidos motorcycle gang.

Practical difficulties arise when a large "special panel" is summonsed for a lengthy criminal trial. Such difficulties arise because the number of prospective jurors summonsed will often exceed the capacity of even the largest courtrooms. The manner in which a large panel is accommodated varies widely by jurisdiction and between judges. If video link facilities are available in a courthouse, the entire panel might be invited to attend at the same time and be

[44] 2009 CanLII 81003 (Ont. S.C.).

accommodated in several courtrooms with audio and video feeds from the main courtroom. In Brampton, jurors in the jury assembly room can be video and audio linked to the courtroom used for jury selection.[45] In both trials of Dennis Oland for the alleged murder of his father in Saint John, New Brunswick, jury selection commenced in a local hockey arena.[46]

Large jury pools are frequently managed by first "purging" the panel and subsequently splitting it into smaller groups or "sub-panels", which can be instructed to return to court at staggered intervals to proceed with the jury selection process. The jury is "purged" by the judge calling forward all prospective jurors who may be ineligible for jury service or who are seeking excusal from jury service. Such jurors might be excused or stood aside under s. 633 of the *Criminal Code*.

An alternative to the large jury panel is to summons more than one set of jurors pursuant to s. 13 of the *Juries Act* or to split the larger panel into several smaller sets in accordance with s. 22. The sets can be instructed to arrive at different times so that they may be accommodated in the courthouse. A technical issue arises because a jury should be selected from one jury panel,[47] and each smaller panel is deemed to be a separate panel.[48] Justice Pardu in *Valentine* suggested that this technical defect can be cured by an order merging the panels under s. 22.1 of the *Juries Act*. In that case, the jury selection process is commenced with the return of the first smaller panel. This procedure was approved in principle by the Court of Appeal for Ontario in *R. v. Brown* (2006), 215 C.C.C. (3d) 330 (Ont. C.A.):

> [18] There were several features of this case that required special arrangements for jury selection. First, because of the intense pre-trial publicity, all potential jurors would be challenged for cause. It was reasonable to believe that a number of jurors would be eliminated because of the impact of the publicity on their ability to judge the case impartially. Second, the three accused and the Crown had amongst them a total of eighty-eight peremptory challenges. Finally, it was expected that the trial would be a very long one and that many potential jurors would be excused on hardship grounds.
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> [19] Thus, a large pool of jurors would be needed, far beyond what a literal interpretation of s. 631 could accommodate. That section contemplates a process whereby out of an array of, perhaps, two hundred persons, the names of twenty to thirty persons are pulled from the drum on a random basis. If the first group of persons is insufficient to complete the jury, the court resorts to s. 631(5) and the procedure is repeated.

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[45] See *R. v. White*, 2009 CanLII 42049 (Ont. S.C.), at para. 6.
[46] Bobbi-Jean MacKinnon, "5 jurors selected for Dennis Oland's murder retrial so far", *CBC News* (29 October 2018); Kevin Bissett, "Dennis Oland pleads not guilty to second-degree murder in father's death", *The Canadian Press* (8 September 2015).
[47] See *Valentine*, at para. 9; *R. v. Sandham*, 2009 CanLII 59674 (Ont. S.C.), at para. 3; *R. v. Rowbotham*, 1988 CanLII 147 (Ont. C.A.), at paras. 50-51.
[48] *Juries Act*, at ss. 13(1), 22.

> [20] In this case, that process was not feasible. It was not possible to keep one thousand people waiting. It was not possible to assemble one thousand people every time a pool of twenty or thirty jurors had been exhausted. To apply s. 631 would have resulted in intolerable inconvenience to potential jurors. It would have been unfair to the jurors. As Wein J. said in *R. v. VandenElsen* (2005), 29 C.R. (6th) 325 (Ont. S.C.J.) at para. 15:
>
> > A system, which requires hundreds of persons to wait unnecessarily, perhaps in uncomfortable surroundings, does not support the goals of enhancing the administration of justice. In participating in the selection process, a prospective juror forms direct impressions concerning the court system. The impression left should be that the jury service process is a worthwhile participation in democracy. An unnecessarily inefficient system will not enhance those goals. [Footnote omitted.]
>
> [21] Since it was not possible to proceed in accordance with s. 631 without causing intolerable inconvenience to potential jurors, the trial judge had an inherent jurisdiction to adopt a process that was consistent with the spirit of s. 631. In my view, the process adopted by the trial judge in this case (dividing the array into groups of twenty-five and having these groups attend on successive days for the selection procedures) was a reasonable one. It was a process that he was entitled to adopt and he did not require the consent of the parties to proceed in this manner.

Practitioners may find that the practices of the jury purge differ in the various regions of the Greater Toronto Area. For example, in terms of vetting for hardship, medical issues and other reasonable cause, judges have their own specific preferences. A common practice in Brampton is to identify those who are otherwise ready, willing and able to serve from the panel, but who are unavailable for the current trial, and to excuse them to return on a future date. The remaining members of the panel are then vetted for excusals or deferrals. In other jurisdictions, some judges tend to canvass the entire panel only for language, citizenship, and direct knowledge of participants. Once that has been done, those judges only deal with hardship, medical issues, and other reasonable cause when each juror is brought in individually for the challenge for cause. The benefit of this procedure is that there is no risk that other jurors will hear the requests of other potential jurors and attempt to identify a "get out of jury duty" excuse.

It is recommended that the issue of the jury purge and selection of the jury be canvassed with the trial judge well in advance of the selection.[49]

VII. Bill C-75 – Amendments to Jury Selection Procedures

On June 21, 2019, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make Consequential amendments to other Acts*[50] ("Bill C-75") received Royal Assent. On September 19, 2019, a number of amendments, including those that amend the provisions of the jury selection procedure under the *Criminal Code*, came into force. There are three main changes to the jury selection procedures following Bill C-75: the elimination of the

[49] See *R. v. Sinclair*, 114 O.R. (3d) 284 (C.A.).
[50] S.C. 2019, c. 25.

peremptory challenge; amendments to the judicial stand aside power; and amendments to the challenge for cause procedure.

a. Peremptory Challenges

Prior to Bill C-75, s. 634 of the *Criminal Code* set out the rules governing peremptory challenges. A set number of peremptory challenges were provided to the Crown and to defence to be exercised at their discretion. That number depended on the offence to be tried, the number of jurors, and whether there was a co-accused. When exercised, peremptory challenges allowed counsel to exclude a potential juror from the panel during jury selection, without providing a reason for doing so.

Pursuant to Bill C-75, s. 634 of the *Criminal Code* permitting the Crown and defence counsel to exercise peremptory challenges was repealed. Counsel no longer have the discretion to exclude potential jurors without reason. The Legislative Background of Bill C-75 provides that the abolishment of peremptory challenges addresses the concern that this aspect of the jury selection process may be used to unfairly discriminate against potential jurors, thereby strengthening the public confidence in the jury selection process.

Following the introduction of Bill C-75, a number of cases were heard before the Ontario Superior Court of Justice addressing the constitutionality of the repeal of peremptory challenges, resulting in conflicting case law on this issue. In *R. v. Chouhan*,[51] Justice McMahon held that the elimination of peremptory challenges did not violate an accused's rights under ss. 7, 11(d) and 11(f) of the *Charter*. He held that a reasonable person, fully informed of the safeguards available in the jury selection process that ensure that the jury is independent and impartial, could not conclude that an accused's *Charter* rights would be violated by the elimination of peremptory challenges.[52] He also held that the repeal was not arbitrary, grossly disproportionate, nor overbroad. Justice McMahon noted that one of the key purposes of Bill C-75 was to make the jury selection process more open and transparent. Eliminating peremptory challenges achieves this purpose and goes no further.[53]

In *R. v. King*,[54] Justice Goodman came to a different conclusion. Justice Goodman held that the safeguards mentioned in *Chouhan* were insufficient and were not an adequate substitute for the loss of the peremptory challenge.[55] As a result, he held that a reasonable person, fully

[51] 2019 ONSC 5512.
[52] *R. v. Chouhan*, 2019 ONSC 5512, at para. 59.
[53] *Chouhan*, at para. 83.
[54] 2019 ONSC 6386.
[55] *R. v. King*, 2019 ONSC 6386, at para. 178.

informed of the supposed safeguards available in the jury selection process, would conclude that an accused's right to a fair trial with an independent and impartial jury would be violated by the impugned amendments. Justice Goodman therefore held that the abolition of peremptory challenges violated ss. 11(d) and 11(f) of the *Charter*.[56] He also held that the repeal of s. 634 violated s. 7 of the *Charter*, finding that it was overly broad as it eliminated an Indigenous accused's ability to "prevent discrimination against himself."[57] Justice Goodman declared the removal of peremptory challenges to be invalid and of no force and effect.[58]

Justice Forestell in *R. v. Gordon* held that Justice Goodman's decision was plainly wrong.[59] She agreed with the reasoning in *Chouhan*, finding that the elimination of peremptory challenges did not violate ss. 7, 11(d) of 11(f) of the *Charter*, upholding the repeal as constitutional.

A number of cases have also addressed whether the repeal of peremptory challenges applies prospectively or retrospectively. In *R. v. Lako and McDonald*,[60] Thomas RSJ. held that the repeal of s. 634 was procedural in nature, and therefore applied retrospectively.[61] The accused in that case were not permitted to exercise peremptory challenges during their jury selection that was scheduled to occur after Bill C-75 came into force. Justice McMahon in *Chouhan* agreed with this conclusion.[62]

Justice Dawe in *R. v. Craig*[63] came to a different conclusion. He held that the accused both acquired "statutory rights" to exercise peremptory challenges before Bill C-75 was enacted or took effect. Justice Dawe found that juries empaneled under the new procedure would be differently constituted than juries selected with the exercise of peremptory challenges. For this reason, the elimination of peremptory challenges had an effect on the constitutional right to a jury, and therefore applied prospectively.

An appeal of the *Chouhan* decision was heard by the Court of Appeal for Ontario on December 19, 2019 and a decision was released on January 23, 2020.[64] This decision provides

[56] *King*, at para. 183.
[57] *King*, at para. 231.
[58] *King*, at para. 268.
[59] 2019 ONSC 6508, at para. 15.
[60] 2019 ONSC 5362.
[61] *R. v. Lako and McDonald*, 2019 ONSC 5362, at para. 41.
[62] *Chouhan*, at para. 112.
[63] 2019 ONSC 6732; See also *R. v. Gong* (November 18, 2019), Newmarket, CR-17-3973 (Ont. S.C.); *R. v. Asif*, 2019 ONSC 7031.
[64] *R. v. Chouhan*, 2020 ONCA 40.

much-needed clarity on the constitutionality and temporal application of the repeal of peremptory challenges.

First, Watt J.A. agreed with Justice McMahon that the abolition of peremptory challenges does not infringe s. 11(d) of the *Charter*. First, he observed that there are various in-court and out-of-court mechanisms to protect against juror bias and to meet the constitutional guarantee of an impartial jury.[65] It is the jury selection process as a whole, not each component, which must satisfy the constitutional standard.[66] He also agreed that a jury fully informed of the safeguards in place to ensure the selection of an impartial jury would not conclude that absent peremptory challenges, a jury would not decide the case fairly.[67]

Watt J.A. also held that representativeness of the jury promotes impartiality through the process used to compile the jury roll, not through its ultimate composition. An accused is not entitled to a particular racial or ethnic composition of the jury. Therefore, the availability of peremptory challenges to achieve something to which the accused is not constitutionally entitled does not make the abolition of those challenges unconstitutional.[68]

Second, Watt J.A. agreed with Justice McMahon that the elimination of peremptory challenges does not violate s. 11(f) of the *Charter*. He noted that the core of this dispute involves the impact of the abolition of peremptory challenges on the impartiality of the jury and the fairness of the trial. These interests are more particularly guaranteed by s. 11(d), and therefore, in the absence of any infringement of s. 11(d), there can be no infringement of s. 11(f).[69] Second, although representativeness is broader under s. 11(f), the obligation on the state remains the same and relates to the process used to compile the jury roll, not the in-court selection process or the ultimate composition of the jury.[70] Finally, s. 11(f) guarantees a "trial by jury", and the abolition of peremptory challenges does not change this.[71]

Third, Watt J.A. agreed with Justice McMahon that the elimination of peremptory challenges does not violate s. 7 of the *Charter*. He held that the Appellant could not establish a causal connection between the abolition of peremptory challenges and the deprivation of his right to liberty or security of the person.[72] Further, he held that the interests raised in the Appellant's

[65] *Chouhan* (ONCA), at para. 66.
[66] *Chouhan* (ONCA), at para. 86.
[67] *Chouhan* (ONCA), at para. 91.
[68] *Chouhan* (ONCA), at para. 94.
[69] *Chouhan* (ONCA), at para. 108.
[70] *Chouhan* (ONCA), at para. 109.
[71] *Chouhan* (ONCA), at para. 110.
[72] *Chouhan* (ONCA), at para. 133.

claim under s. 7 are specifically protected under s. 11(d). Therefore, the rejection of this claim under s. 11(d) is dispositive of the claim under s. 7.[73]

In regard to its temporal application, Watt J.A. held that the abolition of peremptory challenges applied prospectively. He noted that the elimination of peremptory challenges will inevitably have a significant impact on the composition of the jury and may result in a differently constituted jury.[74] The fact that the jury is differently constituted does not affect the constitutionality of the amendments, but the loss of one's right to participate in the selection of the jury does affect the accused's right to a trial by jury as it existed before the amendments.[75] Therefore, if the accused had a vested right to a trial by judge and jury prior to September 19, 2019, the amendments do not apply and both the accused and the Crown have the right to peremptory challenges, even if the trial is held after September 19, 2019.[76] For the right to be vested, the accused must have been charged with an offence within the exclusive jurisdiction of the Superior Court, have been directly indicted, have elected a trial in the Superior Court by judge and jury, or have made a clear, but informal election to a trial by judge and jury before September 19, 2019.[77]

b. Judicial Stand Aside Power

Prior to Bill C-75, s. 633 of the *Criminal Code* gave a judge the power to stand aside jurors for personal hardship or any other reasonable cause. The effect of standing aside a juror enables the judge to move to the next prospective juror, and to dismiss a juror that has been stood aside once a full jury has been confirmed.

Following Bill C-75, a judge is now permitted to stand aside a juror in order to maintain public confidence in the administration of justice, in addition to personal hardship or any other reasonable cause. The language "maintaining public confidence in the administration of justice" is new and covers different ground.[78] For example, in *Chouhan*, Justice McMahon stood aside a prospective juror who had been found impartial on the challenge cause after counsel for the accused made submissions that a rude gesture had been made by the prospective juror when asked to face the accused.[79] This amendment ultimately provides a tool for judges to promote the selection of an impartial, representative and competent jury.

[73] *Chouhan* (ONCA), at para. 136.
[74] *Chouhan* (ONCA), at para. 208.
[75] *Chouhan* (ONCA), at para. 210.
[76] *Chouhan* (ONCA), at para. 211.
[77] *Chouhan* (ONCA), at para. 212.
[78] *Chouhan* (ONCA), at para. 70.
[79] *Chouhan* (ONCA), at para. 70.

There has only been one case out of Saskatchewan that addresses the retrospective application of the enhanced stand aside power. In *R. v. Dorion*,[80] Justice Danyliuk confirms that it is unclear how far the new stand aside power extends, or how it is to be used. However, he notes that it injects a subjective, judge-mandated element to jury selection. He suggests that the amendment creates a new paradigm departing from "triers of fact selected with input from Crown and defence, a 'jury of peers' for an accused person." Instead, in the new paradigm, "[i]t is a jury of the accused's peers as modified by the views of the trial judge as to what a properly representative jury ought to look like."[81] Justice Danyliuk holds that the effect of the enhanced stand aside power is substantive and highly transformative in its implementation,[82] and therefore, the amendment to the stand aside power does not apply retrospectively.

There has not been any case law that has interpreted the constitutionality of the enhanced stand aside power. In *Chouhan*, Justice McMahon noted that the enhanced stand aside power provides a safeguard to ensure the independence and impartiality of the jury. This safeguard ensures transparency and fairness in the jury selection process, as it permits the judge to stand aside a prospective juror to maintain public confidence in the administration of justice if counsel can articular reasons why a prospective juror would not be impartial.[83] Justice Forestell agreed in *Gordon*. Although Justice Goodman in *King* found the enhanced stand asides to be an insufficient safeguard to protect the independence and impartiality of the jury, he did not make a finding that this amendment was unconstitutional.

In *Chouhan*, Watt J.A. on behalf of the Court of Appeal ultimately agreed with Justice McMahon and found that the amendments to the judicial stand aside power assist in ensuring the accused's constitutional guarantee to an impartial jury.[84] However, the Court of Appeal did not receive any submissions on this specific amendment and was therefore unable to address the boundaries of this additional authority.[85]

c. Challenge for Cause

The challenge for cause procedure is an important aspect of jury selection that ensures only eligible and impartial jurors are selected to try a case. Section 638 of the *Criminal Code* sets

[80] 2019 SKQB 266.
[81] *Dorion*, at para. 31.
[82] *Dorion*, at para. 38.
[83] *Chouhan*, at para. 54.
[84] *Chouhan* (ONCA), at para. 71.
[85] *Chouhan* (ONCA), at para. 71.

out that the Crown and defence counsel are entitled to any number of challenges for cause on a number of grounds, including that a juror is not impartial.

It is well established that a trial judge has inherent jurisdiction to control the jury selection process involving challenges for cause.[86] Where a challenge for cause is sought, the burden is on the applicant to satisfy the court that there is a realistic potential that a jury pool may contain potential jurors who are not impartial in the sense that, even upon proper instruction by the trial judge, they may not be able to set aside their prejudice and decide fairly between the Crown and the accused.[87]

The parties can consent that the challenge for cause proceed, otherwise the applicant must provide an evidentiary foundation that there is: (1) widespread bias within the community; and (2) some jurors may be incapable of setting aside such bias, despite trial safeguards.[88] A trial judge can also take judicial notice of widespread bias within the community.[89]

Prior to Bill C-75, all challenges for cause listed under s. 638 (with the exception of the juror's name not appearing on the panel) were decided by two lay persons called "triers". This procedure was set out in s. 640 of the *Criminal Code*. These triers were not trained in law and were randomly selected from the jury panel. Section 640(2) provided that the two jurors who were last sworn ("rotating triers"), or two persons present who were appointed by the court ("static triers"), were to decide whether the ground of the challenge for cause is "true". In other words, if the triers decide that the challenge for cause is true, the juror is "not acceptable" and cannot be sworn.

The Legislative Background for Bill C-75 provides that the procedure involving rotating and static triers led to confusion and delays in the selection of a jury. Therefore, Bill C-75 amends s. 640 by shifting the responsibility for deciding whether the challenge for cause is "true" to the judge, eliminating the lay trier procedure. Section 640(1) of the *Criminal Code* now provides that if a challenge for cause is made on a ground listed in s. 638, the judge shall determine whether the alleged ground is true, and if satisfied that it is true, the juror shall not be sworn. According to the Legislative Background, judges, who are trained and impartial adjudicators, are now able to oversee the challenge for cause process in order to improve the efficiency and effectiveness of jury selection.

[86] *R. v. Province*, 2019 ONCA 638.
[87] See *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863.
[88] *Find*, at para. 32.
[89] *Find*, at para. 47.

Section 640(2) permits the judge to order the exclusion of all jurors, sworn and unsworn, from the courtroom until the judge has determined whether the challenge for cause is true. An exclusion order may be necessary to preserve the impartiality of the jurors.

Similar to the elimination of peremptory challenges, the amendments to the challenge for cause procedure prompted a number of applications before the Ontario Superior Court of Justice on the constitutionality and retrospective application of this amendment. Justice McMahon in *Chouhan* held that the amendments to the challenge for cause procedure simply changed the procedure for determining whether a prospective juror can decide the case impartially or not.[90] The elimination of lay triers and the replacement with the trial judge did not usurp the independence of the jury nor impact on the jury's impartiality, but rather increased transparency and independence of the jury. He therefore concluded that the amendments to the challenge for cause procedure did not violate ss. 7, 11(d), and 11(f) of the *Charter*.[91]

Justice Goodman in *King* agreed with Justice McMahon's ruling in *Chouhan*. He held that the trial judge already played an important role in deciding who may be a potential juror, and that a reasonable, informed person would appreciate the fundamental principle of judicial independence in addressing the challenge for cause as a neutral and impartial arbiter.[92]

Other judges have also been unanimous in holding that the amendments to the challenge for cause procedure apply retrospectively as they are procedural in nature.[93]

The recent Court of Appeal for Ontario's decision in *Chouhan* also provided clarity on the constitutionality and temporal application of the amendments to the challenge for cause procedure. In *Chouhan*, Watt J.A. held that the substitution of lay triers with the presiding judge does not compromise the independence of the jury. The judge benefits from a strong presumption of impartiality, and that presumption can only be rebutted by cogent evidence. The subjective beliefs of an accused that a judge is connected to the state (and therefore not impartial) is not evidence sufficient to rebut this presumption.[94] Further, the assignment of the presiding judge to determine the truth of the challenge for cause does not compromise the division of responsibilities between the judge and jury as the judge has always had a role in jury selection.[95]

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[90] *Chouhan*, at para. 89.
[91] *Chouhan*, at para. 101.
[92] *King,* at para. 287.
[93] See e.g. *Chouhan*; *King*; *R. v. Khan*, 2019 ONSC 5646; *Gong*; *R. v. Johnson*, 2019 ONSC 6754.
[94] *Chouhan* (ONCA)*,* at para. 155.
[95] *Chouhan* (ONCA)*,* at para. 159.

Watt J.A. also held that the amendments does not compromise the impartiality of the jury. Prospective jurors found not to be impartial must not be empaneled, and those found to be impartial may still be subject to excusal or may be stood aside.[96] Therefore, the in-trial mechanisms to counter bias are sufficient to preserve juror impartiality.[97]

Therefore, Watt J.A. held that the amendments to the challenge for cause procedure do not violate ss. 11(d), 11(f) and 7 of the *Charter*.

In regard to its temporal application, Watt J.A. noted that the effect of the amendments is to substitute the presiding judge as the only trier of the challenge for cause.[98] The only difference between the current and former provisions is the identity of the trier and the availability of a choice of rotating versus static triers.[99] Unlike peremptory challenges, the challenge for cause procedure remains available, and the amendment does not impair or negatively affect the right to a trial by judge and jury.[100] Watt J.A. therefore held that the amendment to the challenge for cause procedure is purely procedural and thus applies retrospectively to all cases tried on or after September 19, 2019, irrespective of when the right vested.

VIII. Race-Based Challenges and the Content of the *Parks* Question

Parties are permitted to challenge prospective jurors on whether they can decide the case impartially. In *R. v. Parks*,[101] Doherty J.A. held that a potential juror may be asked, pursuant to the challenge for cause procedure, whether their ability to judge the evidence in the case without bias, prejudice or partiality would be affected by the fact that the accused was a racial minority. This has come to be known as the "*Parks* question".

The question that was the subject of the appeal in *Parks* reads as follows:

> As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused a juror must judge the evidence of the witnesses without bias, prejudice or partiality:
>
> …
>
> (2) Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?

[96] *Chouhan* (ONCA), at para. 156.
[97] *Chouhan* (ONCA), at para. 156.
[98] *Chouhan* (ONCA), at para. 214.
[99] *Chouhan* (ONCA), at para. 215.
[100] *Chouhan* (ONCA), at para. 215.
[101] (1993), 84 C.C.C. (3d) 353 (Ont. C.A.).

It is noteworthy that this phrasing was not formulated by Doherty J.A. It was the wording submitted by counsel for Parks and refused by the trial judge. However, this language continues to be repeated in jury trials over 25 years later.

The wording of the "*Parks* question" for race-based challenges for cause has been the subject of discussion in case law. Some decisions have altered the typical language. For example, the use of a multiple-choice question has been discussed in a number of decisions. In *R. v. Douse*,[102] Justice Durno permitted the following question to be put to prospective jurors:

> As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused a juror must judge the evidence of the witnesses without bias, prejudice or partiality.
>
> Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black and the victim is a white woman? Which answer most accurately reflects your answer to that question:
>
> (a) I would not be able to judge the case fairly.
>
> (b) I might be able to judge the case fairly.
>
> (c) I would be able to judge the case fairly.
>
> (d) I do not know if I would be able to judge the case fairly.

The form of question permitted by Justice Durno has been adopted by some trial courts and rejected by others.[103]

In *Johnson*, Justice Nordheimer refused a defence request to permit a multiple-choice question. He observed, at para. 6:

> What the *Douse* approach does not provide for, however, is the advantage of having the prospective juror answer the question spontaneously and in his or her own words and manner. Rather, the *Douse* approach directs the prospective juror to select a stock or pre-fixed response. If the goal of the process is to attempt to get at the true attitude of the prospective juror when it comes to matters of racial bias or partiality, then it seems to me that the triers would gain a great deal more in that regard from the spontaneous response of the prospective juror than would be revealed by the person selecting from a list of answers framed in the words of others.

[102] (2009), 246 C.C.C. (3d) 227 (Ont. S.C.).

[103] For example, in *R. v. Lewis*, 2011 ONSC 7631 and *R. v. Valentine*, [2009] O.J. No. 5961 (S.C.), multiple choice questions framed similarly to the *Douse* question were permitted. Requests for multiple choice questions were refused in *R. v. Ahmad*, 2010 ONSC 256; *R. v. Johnson*, 2010 ONSC 5190; *R. v. Stewart*, 2011 ONSC 1949; *R. v. Barnes*, 2012 ONSC 7184; *R. v. L.W.*, 2013 CanLII 58252 (Ont. S.C.); *R. v. Gayle*, 2013 ONSC 5343; *R. v. Borden*, 2014 ONSC 5751; *R. v. O'Hara-Salmon*, 2014 ONSC 5880; *R. v. Brooks*, 2015 ONSC 6299; *R. v. Suarez-Noa*, 2018 ONSC 6749.

In *R. v. Suarez-Noa*,[104] Justice King refused a defence request to permit a multiple-choice question, noting that

> [T]he multiple choice proposal would unduly prolong the challenge process, add a degree of confusion to a prospective juror, who is no doubt nervous or apprehensive by the very nature of the proceeding; while having to memorize or recite by rote one of the four catch phrases that best describes his or her views".[105]

In the decades since *Parks* was decided, difficulties with the inaccessible phrasing of the question have been observed. Justice Nordheimer notes in *Johnson*, for example, that the expression "without bias, prejudice or partiality" has "proven to be confusing to many prospective jurors".[106] He suggests that there is nothing in the question that draws attention to the principal issue in the challenge for cause process – will the juror consider the evidence fairly? He suggested an alternative wording in that case, agreed to by all counsel, which reads as follows:

> As His Honour will tell you, in deciding whether or not the prosecution has proven the charge against an accused, a juror must judge the evidence of the witnesses without bias, prejudice or partiality.
>
> Would your ability to judge the evidence in this trial fairly be affected by the fact that the person charged is black?

Comments expressing agreement with Justice Nordheimer's discussion and revised formulation have been expressed in a number of cases.[107] Trial judges have, in particular, approved the use of the word "fairly" in lieu of "without bias, prejudice or partiality".

A pragmatic and purposive approach to the framing of the question should be utilized. As Justice Pomerance noted in *R. v. Muvunga*:[108]

> [3] The conduct of a challenge for cause falls within the broad discretion of the trial judge. In order for the law to evolve, trial judges must take a flexible and open-minded approach. It is difficult to root out racial prejudice, as it often has both a conscious and non-conscious character. The courts must be vigilant to screen out the insidious partiality that can flow from racial prejudice and stereotypes. While the *Parks* question has been used in Canadian courtrooms for many years, it may not be the only or even the best way to uncover and assess racial bias. As stated by Sharpe J.A. in *R. v. Gayle*, [2001] O.J. No. 1559 (C.A.), at para. 34, "Trial judges should avoid adopting a routine, mechanical or formulaic approach in this difficult and sensitive area". Reference may also be made to the compelling critique of the *Parks* question offered by Murray J. in *R. v. Sinclair*, 2009 CanLII 29912 (Ont. S.C.), aff'd on other grounds, 2013 ONCA 64. [Emphasis added.]

[104] 2018 ONSC 6748.
[105] *Suarez-Noa*, at para. 26.
[106] *Johnson*, at para. 15.
[107] See for example *Stewart*; *Barnes*; *L.W.*; *Gayle*; *Borden*; *O'Hara-Salmon*.
[108] 2013 ONSC 2770, at para. 3.

IX. Other Challenges to Prospective Jurors

a. #MeToo

In addition to race-based challenges, counsel have also applied to challenge prospective jurors on other grounds of impartially. For example, in *R. v. Borne*[109] and *R. v. T.J.*,[110] the defendants brought applications to question potential jurors on whether the "#MeToo" movement impacted their ability to decide a sexual assault case impartially. Relying on a number of secondary sources from news media, the accused in both cases requested that the judge take judicial notice of the prevalence of the "#MeToo" movement and its message to believe victims of sexual assault.

Justice de Sa noted in *T.J.* that our system trusts that juries will comply with their duties in the face of prevailing public opinion.[111] He held that an increased awareness of the issues inherent in the message of the "#MeToo" movement has no apparent connection to the risk of juror impartiality against the accused, but rather reinforces the need for jurors to treat the offences in question as serious ones. Justice de Sa had no concerns that prospective jurors would treat the presumption of innocence with any less vigour, and therefore dismissed the application.[112]

Justice Koke in *Borne* was unable to take judicial notice that the "#MeToo" movement had contributed to widespread bias against persons accused of sexual offences.[113] He too held that the movement increased the public's desire to ensure that such offences are dealt with justly and fairly, and found that any issues of bias could be handled by other safeguards, such as an instruction by the trial judge to the jury. The application was also dismissed.

b. Linguistic Competence in Official Language

Parties have also sought to challenge prospective jurors on their knowledge and competency of the English language. In *R. v. Wilkins*,[114] the accused filed an application under s. 638(1)(f) of the *Criminal Code* to challenge prospective jurors for cause on the basis that they are not proficient in English, the language in which the trial was to be held. Justice Dawson held that s. 638(1)(f) was enacted to ensure that an accused has a full opportunity to have their trial conducted in the official language of their choice, or a bilingual trial.[115] It does not authorize an

[109] 2018 ONSC 3733.
[110] 2018 ONSC 5001.
[111] *R. v. T.J.*, 2018 ONSC 5001, at para. 20.
[112] *T.J.*, at paras. 21-22.
[113] *R. v. Borne*, 2018 ONSC 3733, at para. 17.
[114] 2016 ONSC 2966.
[115] *R. v. Wilkins*, 2016 ONSC 2966, at para. 27.

accused to question prospective jurors on their language competence to ensure trial fairness. The application was therefore denied.

Identical applications have been filed in a number of cases before the Ontario Superior Court of Justice, including *R. v. Smith and Mathers*.[116] Justice Tzimas in *Smith and Mathers* noted that during the jury selection process, potential jurors are vetted for their ability to hear and understand English, and jurors are asked to self-identify if they have difficulty understanding the English language. If a potential juror self-identifies as such, a conversation or written exchange between the juror and the judge will take place to determine the juror's actual language competency and proficiency. Justice Tzimas held that to repeat the inquiry with a challenge for cause question would be a waste of time and therefore dismissed the application.[117]

Four appeals on this issue were argued together before the Court of Appeal for Ontario and are currently on reserve.[118] Three of the four appellants obtained orders under s. 530 of the *Criminal Code* at their preliminary inquiries.[119] Where an accused speaks French or English, s. 530 provides for a mandatory order "directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada." The order must be requested no later than the appearance at which the trial date is set. Having obtained s. 530 orders, the appellants argue that they were entitled to a challenge for cause under s. 638(1)(f) of the *Criminal Code*. That section provides:

> 638 (1) A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> …
>
> (f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, **where the accused is required by reason of an order under section 530** to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be. [Emphasis added.]

The application judges in the courts below have generally followed the approach in *Wilkins*, following *Sherratt*, of requiring the applicant to establish an air of reality to ground the

[116] 2019 ONSC 4816.
[117] *R. v. Smith and Mathers*, 2019 ONSC 4816, at para. 16.
[118] *R. v. Wilkins* (C66261); *R. v. Thomas* (C66866); *R. v. Poobalasingam* (C66068 & C66193).
[119] *R. v. Wilkins* (C66261)(Factum of the Appellant); *R. v. Thomas* (C66866)(Factum of the Appellant); *R. v. Poobalasingam* (C66068 & C66193)(Factum of the Appellants).

challenge. In *Wilkins*, the accused filed census data showing that about 50% of respondents in Mississauga and Brampton indicated that their "mother tongue" was English or French.[120] Justice Dawson found that this data on its own was insufficient to ground an air of reality because there was no direct correlation between one's "mother tongue" and one's ability to speak an official language. He also noted a concern that members of visible minorities on the jury panel may feel discriminated against if questioned about their linguistic competence. The respondent Crowns in the four appeals have argued that the "air of reality" approach is the correct one and that there is no automatic entitlement to a s. 638(1)(f) challenge for cause if a s. 530 order has been obtained.[121] They have expressed concern about wasted time if such challenges become routine.[122]

Practitioners should be attentive to the Court of Appeal's resolution of this issue. Aside from considerations of whether a s. 530 order should be obtained before setting a trial date or seeking a challenge for cause under s. 638(1)(f), the decision may be informative about the court's approach to challenge for cause applications in the wake of the elimination of peremptory challenges.

c. Reconsideration of *Sherratt* after Bill C-75

There is no dispute that Bill C-75 marks the most significant change to the Canadian jury selection landscape in recent history. The most immediate consequences pertaining to retrospective or prospective application of the amendments will soon be in the past as new post-amendment cases start to fill trial dockets. As we leave behind peremptory challenges and lay adjudication of challenges for cause, we enter a state of uncertainty about how the new paradigm will evolve to ensure that trial fairness will be guaranteed.

The former challenge for cause regime was relatively circumscribed in its scope. In *Sherratt*, Justice L'Heureux-Dubé held that for a partiality challenge for cause to be put to prospective jurors (in that case relating to pre-trial publicity), the challenger must show an air of reality for the challenge before it could be put to the "mini-jury" trying its truth.[123] The court was concerned about the "mini-trial" conducted by the triers of the challenge exceeding permissible bounds and giving the trial judge a reasonable degree of control of the challenge.[124] The court

[120] *Wilkins*, at paras. 38-44.
[121] *R. v. Wilkins* (C66261)(Factum of the Respondent); *R. v. Thomas* (C66866)(Factum of the Respondent); *R. v. Poobalasingam* (C66068 & C66193)(Factum of the Respondents).
[122] *R. v. Wilkins* (C66261)(Factum of the Respondent); *R. v. Thomas* (C66866)(Factum of the Respondent); *R. v. Poobalasingam* (C66068 & C66193)(Factum of the Respondents).
[123] *R. v. Sherratt*, [1991] 1 S.C.R. 509, at pp. 535-36.
[124] *Sherratt*, at pp. 535-36.

also justified its decision by noting that "information obtained on an ultimately unsuccessful challenge for cause may, however, lead the challenger to exercise the right to challenge peremptorily or to stand aside the particular juror."[125] Both of these rationales are imperiled by Bill C-75, which shifts the adjudication of the challenge for cause to the judge and eliminates the peremptory challenge.

How this will all play out remains to be seen. If the trial judge is the trier of the truth of the challenge, concerns about challenges exceeding permissible bounds are attenuated. It may be that a more flexible approach to challenges for cause is called for in post-Bill C-75 trials. Whether or not challenges for cause remain relatively rigid, the expanded stand aside power contained in s. 633 of the *Criminal Code* may serve to respond to jury selection concerns perhaps previously addressed by peremptory challenges. For example, if a juror's occupation is proximate to the alleged offence being tried or they live in the neighbourhood where an offence allegedly occurred and the juror has not been otherwise excused, counsel might advocate for the trial judge to make further inquiries of the juror under s. 633 and consider standing the juror aside.

If such processes are formulated and followed in a principled way, it seems unlikely that trials will be unduly lengthened, particularly in opposition to multiple-accused homicide trials with dozens of peremptory challenges under the previous regime. As Justice L'Heureux-Dubé noted in *Sherratt*:

> If the challenge process is used in a principled fashion, according to its underlying rationales, possible inconvenience to potential jurors or the possibility of slightly lengthening trials is not too great a price for society to pay in ensuring that accused persons in this country have, and appear to have, a fair trial before an impartial tribunal, in this case, the jury.[126]

X. Discharge and Replacement of Sworn Jurors

It is not uncommon to finish selecting jurors and alternates, and to later receive a communication from a juror that there is a scheduling issue or illness rendering it difficult for them to serve on the jury. Events can happen that will require the discharging and replacement of jurors.

The discharging of jurors is governed by s. 644(1) of the *Criminal Code*. A trial judge may discharge a juror during the course of a trial if he or she is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act. Section 644(1.1) then provides for the replacement of the discharged juror if the jury has not yet begun to hear evidence.

[125] *Sherratt*, at p. 533.
[126] *Sherratt*, at p. 533.

If a juror is lost before the jury is put in charge, that juror must be replaced, because a trial cannot start with fewer than 12 jurors, even if the accused consents.[127] If a juror is lost after the jury is put in charge, that juror can be replaced so long as the jury has not yet begun to hear evidence. If an alternate juror was selected during the selection process, that alternate would replace the discharged juror. If no alternate was selected, then a replacement juror could be selected from the panel or, if necessary, with resort to the procedure set out in s. 642(1).[128]

A juror inquiry to discharge a juror under s. 644(1) should take place in open court, on the record, and in the presence of the accused and the Crown.[129] Counsel should be permitted to suggest questions to be asked of the juror and to make submissions about the decision to be made, but should not be permitted to ask the juror questions directly.[130] There is no principled reason for the juror to be put under oath or solemn affirmation during the inquiry.[131]

In *R. v. Kossyrine*,[132] the trial judge discharged a juror – a 70-year-old biology professor – who used a walker because he had broken his back. In the initial screening of the jury, the trial judge was inclined to excuse the juror, but the juror insisted he wanted to remain. The juror was not excused and was selected as a juror. After the Crown finished his opening address, it was determined that the juror had a hearing problem and had a hearing aid but had not activated it. He was also on painkillers for his back injury. The juror said that he wanted to sit on the jury, though he was "not insisting". The Crown ultimately took the position that the juror ought to be discharged. Defence counsel opposed. The trial judge discharged the juror and he was replaced by an alternate juror.

On appeal, Kossyrine argued that the juror was the victim of disability-based discrimination and the discharge deprived him of a fair trial. The Court of Appeal dismissed this argument, holding that he was not deprived of his right to a fair trial and that Kossyrine could not assert the rights of a juror. The trial judge had to make his own determination about whether the juror was capable of serving as a juror (i.e. capable of listening to and concentrating on the evidence, and of comprehending and analyzing it). The trial judge has broad discretion to determine whether or not a juror should be discharged under s. 644(1), discretion entitled to deference by appellate courts. The considerations before the trial judge afforded him a sound basis to conclude that he had reasonable cause to discharge the juror.

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[127] See *Basarabas & Spek v. The Queen*, [1982] 2 S.C.R. 730.
[128] See Fuerst & Sanderson, at p. 650-51.
[129] *R. v. Durant*, 2019 ONCA 74, at para. 143.
[130] *Durant*, at para. 143.
[131] *Durant*, at para. 143.
[132] 2017 ONCA 388.

For a more detailed review of the procedure to be followed on a juror discharge inquiry under s. 644(1), see Watt J.A.'s reasons in *Durant*.[133]

XI. Continuing a Trial Judge-Alone Where Jury Quorum Lost

Practitioners should take note that Bill C-75 has amended the *Criminal Code* to permit a trial to continue judge-alone where the number of jurors has been reduced below 10. Consent of all the parties is required. Section 644(3) now provides:

> (3) If in the course of a trial the number of jurors is reduced below 10, the judge may, with the consent of the parties, discharge the jurors, continue the trial without a jury and render a verdict.

PART 2: JURY MANAGEMENT

Once the jury is selected, there are a number of ongoing jury management issues that may arise from the commencement of the trial until the jury returns its verdict. Sometimes jury conduct issues only come to light after the verdict has been rendered. In this section, we briefly canvass a number of issues arising in jury management to assist in their identification and to permit timely response.

XII. When May Jurors Be Permitted to Put Questions Directly to Witnesses?

Jurors may be permitted to directly question witnesses in certain circumstances, however, this will generally be permitted very rarely.[134] Such a procedure is a discretionary power of the court, and "proper safeguards must be put in place to ensure that only admissible evidence is elicited and that the parties are not prejudiced."[135]

a. Inherent Dangers

The dangers of permitting the jury to question a witness include the following:[136]

i. The questions may potentially elicit inadmissible evidence;
ii. The jury may ask questions that are contrary to trial counsel's strategy;
iii. Such questions may trigger objections from counsel, thereby creating the impression that important evidence is being hidden from the jury;
iv. Jurors may transition from being judges to being advocates;

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[133] 2019 ONCA 74.
[134] *R. v. G. (A.)*, 2015 ONCA 159, at paras. 63-66; *R. v. Andrade* (1985), 18 C.C.C. (3d) 41 (Ont. C.A.), at pp. 59-60.
[135] *G. (A.)*, at para. 63.
[136] *G. (A.)*, at para. 64; *R. v. Koopmans*, 2015 BCSC 2501, at para. 11.

v. It may lengthen the trial; and

vi. Where a question submitted by the jury is not permitted, this may inadvertently or incorrectly signal to the jury that a particular witness's testimony is less important or reliable.

b. Recommended Limits

Where the jury is permitted to directly question one or more witnesses, proper limitations are recommended. For example, the following limitations were applied recently in *R. v. Blowes-Serrata and Nelson*:[137]

i. That the judge informs the jury at the start of the proceedings of the adversarial dynamic and that parties have the freedom to decide their strategy;

ii. That it is preferable for the jury to wait until both parties have terminated their questioning before posing questions;

iii. That the jury should not be transformed into a third party in the trial;[138] and

iv. That the questions first be submitted in writing to the trial judge, who after consulting with the lawyers, shall decide on the admissibility of those questions.[139]

In *R. v. G. (A.)*, the Court of Appeal affirmed a trial court's refusal to put a jury question to an expert witness where "the proposed question went well beyond clarification and opened up a new issue regarding the removal of DNA in the laundering process."[140] The proposed question was "irrelevant to the matters at issue in the case" because it was entirely hypothetical – whether a laundry cycle could remove all traces of DNA when there was no evidence that the item in question had been washed.

In *Blowes-Serrata and Nelson*, after a clarifying question was submitted by the jury, defence counsel for one co-accused submitted that the court should "invite the jury to submit questions for all witnesses."[141] The court refused to do so, and noted that the perceived benefits would have been outweighed by the following factors:[142]

i. Consideration of the fair trial rights of the co-accused and the Crown, who both expressed concerns about juror questioning;

[137] 2018 ONSC 6606, at para. 18.
[138] Citing *R. v. Nordyne*, (1998), 17 C.R. (5th) 393, at para. 7.
[139] Citing *Nordyne*, at para. 8.
[140] *Blowes-Serrata and Nelson*, at paras. 67-68.
[141] *Blowes-Serrata and Nelson*, at para. 8.
[142] *Blowes-Serrata and Nelson*, at para. 22.

ii. Allowing jurors to question Crown witnesses opens the door to questioning the accused (assuming they testify), creating a risk of improper questioning; and

iii. Concerns about lengthening the proceedings in a trial with interpreters.

XIII. Juror Misconduct & Intoxication During Sequestration

Section 647(2) of the *Criminal Code* provides authority to the trial judge to provide direction to court staff regarding sequestered jurors. When jurors are sequestered, they are typically given written instructions that set out the guidelines and expectations of jurors during deliberation. Section 647(5) states that a trial judge shall direct the sheriff to provide sequestered jurors with sufficient refreshment, food and lodging until they have given their verdict. Trial judges will often be asked to make decisions and provide directions pursuant to these sections regarding, for example, the consumption of alcohol by jurors and whether television sets may remain on in hotel rooms.

There have been at least two reported decisions in Ontario that deal with issues involving a sequestered jury.

First, in *R. v. Robinson*,[143] the appellant was convicted of first-degree murder. The appellant sought leave to present "fresh evidence" that on the second evening of deliberations, over a dinner break lasting from 5:00 p.m. to 8:20 p.m., the jury consumed six bottles of wine and six drinks of liquor in total. The trial judge had authorized the jurors to have one drink with an evening meal if requested. The jury resumed deliberations until 10:00 p.m. On the following morning, the jury deliberated further, rendering their verdict at 12:25 p.m.

The appellant argued that given the total consumption of alcohol, at least one of the jurors must have been intoxicated and the deliberations adversely affected. The Court of Appeal for Ontario rejected this argument. It held that it is not the consumption of alcohol itself, but the intoxication that must be the test. In this case, there was no evidence of intoxication. The trial judge, who was in the corridor when the jury returned from their dinner break, stated that he saw no sign of the consumption of alcohol at that time.

More recently, in *Zvolensky*, the appellants submitted that the conduct of certain jurors and court services officers (“CSOs”) caused a miscarriage of justice warranting a new trial. During one night of sequestration, several issues with the jury’s conduct arose. These included possible

[143] [1987] O.J. No. 416 (C.A.).

intoxication, jurors socializing separately from other members of the jury, and expressions of preference and resentment towards the trial judge's instructions. The appellants alleged that CSOs allowed unsupervised late-night fraternization, separation of the jury during deliberations, and alcohol consumption. They further alleged that the CSOs entertained inappropriate conversations with jurors and failed to alert the trial judge of these issues. The trial judge learned of these potential issues after the trial ended. A Special Commissioner was then appointed pursuant to s. 683(1)(e) of the *Criminal Code* to inquire into the jury. Based on the Commissioner's report, the appellants obtained an order, on consent, to cross-examine the CSOs involved.

The Court of Appeal ultimately dismissed the appeal. The court held that jurors are entitled to the same "strong presumption of impartiality" as judges, and that there is "a heavy burden on a party who seeks to rebut this presumption". Jurors are presumed to govern themselves by the oath sworn to try the accused on the evidence adduced in the courtroom. In this case, there was no evidence that jurors were deliberating in smaller groups on the night in question. There was also no evidence that any juror's ability to fulfil their duty was impaired by alcohol. The court also noted that momentary expressions of frustration by jurors are to be expected. This is not however a basis to find a miscarriage of justice.

The court reviewed the sequestration provision in s. 647(2) of the *Criminal Code*. The purpose of this section is to protect jurors from outside influences that might affect their verdict. However, the court held that the section does not prevent them from, for example, speaking with a server about meal options or their physician about their health. The section also does not always require that all 12 jurors be together during deliberations. The court recognized the reality that CSOs will inevitably have to communicate with jurors about matters such as meals, hotel rooms, medical needs, or cigarette breaks. In this case, the CSOs did not discuss the case with the jurors. It was not improper for CSOs to have maintained a friendly relationship with the jury.

Watt J.A., concurring in the result, set out the following guidelines for trial judges dealing with sequestered jurors:[144]

i. First, it is good practice for trial judges to tell jurors not to deliberate when the entire group is not together. However, some casual comment about the case in smaller groups does not amount to a miscarriage of justice. The requirement of unanimity

[144] *Zvolensky*, at paras. 258-262.

of verdict removes any concern about comments that may be made when one or more other jurors are not present.

ii. Second, trial judges should remind court staff, in the absence of the jury and at the outset of the trial, to bring to their attention any issues related to jury management or the jury's ability to perform its duties. It may also be necessary to bring these issues to the attention of counsel. CSOs should keep the trial judge apprised of any issues related to jury management and ability.

iii. Third, trial judges should keep jurors apprised of scheduling issues. Explanations should be shaped to avoid disclosure of inappropriate information and steps should be taken to ensure accurate delivery of the information by court staff or by the judge in open court.

iv. Fourth, the trial judge should advise the jury that they will be told what they need to bring in case deliberations extend overnight.

v. Fifth, trial judges should consider giving instructions that deliberations are only to take place in the jury room when all jurors are present. This may forestall small group discussions.

vi. Sixth, it may be prudent to ensure that no fewer than three court services officers are assigned to jurors during overnight accommodations.

In *R. v. Godwin*,[145] about two weeks after the delivery of the jury's verdict in a heroin importation case, one of the jurors sent multiple written communications (by letter and email) to Crown counsel. The appellant argued that the communications went "beyond a mere expression of gratitude from a member of the public to Crown and defence counsel for a job well done, to a demonstration of romantic interest in Crown counsel."[146] Given that the communications arose after the verdict, the Court of Appeal agreed with the trial judge that there was no utility in conducting a jury inquiry, which necessarily would have devolved into an examination of matters protected by jury secrecy, "including jurors' 'minds, emotions or ultimate decision.'"[147] The Court of Appeal was not satisfied that a reasonable person would believe that a reasonable apprehension of bias had been established.[148]

[145] 2018 ONCA 419.
[146] *Godwin*, at para 8.
[147] *Godwin*, at para. 10.
[148] *Godwin*, at para. 14.

Conversely, in *R. v. Dowholis*,[149] the appellant was a man living with HIV (at an undetectable viral load) who was accused of aggravated sexual assault and forcible confinement with respect to four male complainants.[150] The jury foreperson twice appeared on "The Dean Blundell Show" (a "shock jock" program).[151] The foreperson first appeared on the show while the trial was ongoing and "made derogatory comments about sexual activity between men."[152] After a guilty verdict was rendered, the foreperson appeared again and engaged in "more laughter about the participants in the trial, more derisive comments about the lifestyle of the participants, and discussions about the jury's deliberations and the sentence likely to be imposed."[153] The Court of Appeal was satisfied that the appellant had established a reasonable apprehension of bias and ordered a new trial. In so doing, the majority highlighted that the challenge for cause process had not detected the juror's apparent bias:

> In response to the challenge for cause, the juror said he had no bias toward homosexuals. The challenge process highlighted the fact that homophobia was a concern for the court. The juror would have been aware of this. Yet, he participated in public jokes that targeted gay men.[154]

XIV. Addressing Internal Strife Amongst the Jury

The case of *R. v. Giroux*[155] addresses the breadth of a trial judge's power under s. 644[156] as well as the minimum factors a court must consider when inquiring about internal strife among the jury.

First, s. 644 grants a trial judge "broad discretion to discharge a juror if satisfied that the juror cannot continue to act 'by reason of illness or other reasonable cause', and [that] judge's decision is entitled to considerable deference."[157] Such a determination shall be "set aside only when it is tainted by an error of law or principle, there is a misapprehension of material evidence, or it is a decision that is plainly unreasonable."[158]

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[149] 2016 ONCA 801.
[150] *Dowholis*, at para. 3.
[151] *Dowholis*, at para. 11.
[152] *Dowholis*, at para. 11.
[153] *Dowholis*, at para. 11.
[154] *Dowholis*, at para. 34.
[155] [2006] O.J. No. 1375 (Ont. C.A.).
[156] Where a juror may be discharged "in the course of a trial…for illness or other reasonable cause."
[157] *Giroux*, at para. 27, citing *Basarabas v. The Queen*, (1982), 2 C.C.C. (3d) 257 (S.C.C) at 265 (emphasis omitted)
[158] *Durant*, at para. 152, citing *R. v. Lessard*, (1992), 74 C.C.C. (3d) 552 (Que. C.A.), at p. 563; *R. v. Cunningham*, 2012 BCCA 76, at paras. 25-26.

Second, the procedure for questioning a juror under this section is "more inquisitorial than adversarial in nature."[159] In *Giroux*, this involved Crown and defence counsel submitting proposed questions to the trial judge who would determine which questions to put to the juror.

Third, the court set out a number of minimum factors that the trial judge should comply with when conducting a s. 644 inquiry. Such an inquiry:[160]

a) Must be fair to the parties and to all members of the jury;
b) Must be open, in the sense that the trial judge's inquiries should take place in open court, on the record, and in the presence of the accused and counsel;
c) Must enable the trial judge to determine the true nature of the internal problem faced by the jury and to resolve it; and
d) Must preserve the integrity, confidentiality and impartiality of the jury deliberation process.

Although the court in *Giroux* stated that a trial judge should comply with these factors,[161] this no longer appears to be optional. In the Court of Appeal's most recent treatment of s. 644, it has eliminated the permissive language from *Giroux* and has held that trial judges "must follow this non-exhaustive list of considerations."[162]

Lastly, the juror whose suitability is in question need not swear an additional oath or make a further affirmation for a s. 644 inquiry.[163] The oath or affirmation taken when the jury is empaneled continues throughout the s. 644 inquiry and there is no principled reason for additional guarantees of truthfulness.[164]

In *Giroux*, the trial judge received a note from the jury during the first day of deliberations advising that juror seven was acting inappropriately aggressive in the jury room. The note stated that juror seven allegedly stated to another juror, "When you get the f__ out, I will get you."[165] This made other jurors fearful and reluctant to return to the deliberation room.

[159] *Giroux*, at para. 38.
[160] *Giroux*, at para. 38.
[161] See *Giroux*, at para. 35.
[162] *Durant*, at para. 141 (emphasis added).
[163] *Durant*, at para. 144.
[164] *Durant*, at para. 144; see also *Giroux*, at para. 16.
[165] *Giroux*, at para. 13.

The trial judge conducted a s. 644 inquiry. Juror seven admitted to raising his voice and slamming the table.[166] The foreperson was then examined in the absence of the jury and described a number of outbursts. She suggested that juror seven might be suffering from stress at home or a medical issue and believed he should be discharged. Juror seven was then recalled and admitted to "going 'overboard'" but said he was not suffering from undue stress and had no relevant medical conditions.[167] The court heard submissions and both counsel were permitted to submit questions to the trial judge, however, neither party chose to do so.[168] Without hearing further submissions, the trial judge discharged juror seven after the completion of the examinations. Defence counsel's application for a mistrial was dismissed.

While the defendant's appeal was dismissed, the Court of Appeal held that the s. 644 inquiry in this case should have involved the entire jury. The trial judge should have also entertained further submissions before discharging the juror. The court endorsed a contextual approach to s. 644 inquiries. The court also cautioned that trial judges should be mindful that, "There is always the potential that the request to eliminate the strife issue is merely an attempt by a majority of jurors to cast off a dissenting minority opinion."[169]

XV. Managing the Effects of Extraneous Information in the Deliberation Room

A growing issue for jurors in the digital age is easy access to extraneous information about the case through the internet, social media or other sources. In *R. v. Bains and Pannu*,[170] a juror brought a document into the juror room referring to public shock and bafflement following the acquittal of Casey Anthony for the murder of her infant daughter, a notorious case in the United States.

In its decision, the Court of Appeal set out the following factors to determine whether extraneous information brought into the jury room resulted in a miscarriage of justice:[171]

i. Did the jurors actually review the materials, and if so, to what extent? Although a trial judge may not inquire about the effect that extraneous materials may have

[166] *Giroux*, at para. 15.
[167] *Giroux*, at para. 30.
[168] *Giroux*, at paras. 15-20.
[169] *Giroux*, at para. 28.
[170] 2015 ONCA 677.
[171] *Bains and Pannu*, at paras. 100-106.

had on the deliberation process,[172] the party attempting to challenge a verdict has the onus of demonstrating that the jurors actually read the impugned materials.

ii. How long was the document available in the jury room?

iii. To what extent was the extraneous information discussed or considered by the jury? While the jury secrecy rule prohibits any evidence about the effect of the document on a juror's mind during deliberations, it "does not prohibit questions about whether a discussion occurred."[173]

iv. What is the relationship between the extraneous information to the contested issues at trial? The closer the relationship between the extraneous information and the contested issues at trial, the more likely it is that a miscarriage of justice will be made out.

v. Was the extraneous information outside of the juror's generalized knowledge?

vi. Were any curative instructions given or other ameliorative steps taken to redress any prejudice that may have arisen?

vii. Did the extraneous information specifically relate to anyone on trial or reveal any extrinsic misconduct by a person on trial?

The Court of Appeal in *Bains and Pannu* highlighted both the challenges and the importance of keeping extraneous materials out of the deliberation room in the digital era where social media is everywhere and extraneous information is accessible from a variety of sources.[174] In light of this, additional jury instructions relating to the prohibition of extraneous research, including an articulation of the reasons behind such a prohibition, may be desirable.[175] The court suggested the addition of specific research that must not be undertaking, such as "[accessing] legal databases, earlier decisions, pre-trial publicity or any other material of any kind relating to any subject or person connected with the trial."[176]

From a pragmatic perspective, counsel should consider requesting an additional "whistle-blower instruction" at the outset to help minimize the prejudice that may result from extraneous materials.[177] Such an instruction would encourage "any juror who learns a fellow juror has made an inquiry outside court by electronic or other means about the accused, the background of the

[172] Due to the jury secrecy common law rule and s. 649 of the *Criminal Code*, which establishes a summary conviction offence for jurors who disclose information concerning what took place in jury room during deliberations.
[173] *Bains and Pannu*, at para. 102.
[174] *Bains and Pannu*, at para. 71.
[175] *Bains and Pannu*, at paras. 110-111.
[176] *Bains and Pannu*, at paras. 110-111.
[177] *Bains and Pannu*, at para. 112.

offence, the legal principles that apply or any other subject expressly prohibited by the judge, or has caused anybody else to do any of those things, to bring the matter immediately to the attention of the trial judge".[178]

Reviewing recent treatment of *Bains and Pannu*, it appears that the fourth factor – the relationship between the extraneous materials and the live issues at trial – carries considerable weight when determining whether a miscarriage of justice has occurred. In *R. v. Shaw*,[179] a juror went to the crime scene and possibly gained extrinsic information that could have been used in the deliberations. The issue arose after it was discovered that the juror posted pictures of himself taken in front of the restaurant where the murder at issue took place.[180] The accused applied for a mistrial, but it was denied by Justice Clark. The court also refused to conduct a juror inquiry, holding that the evidence presented sufficiently preserved the record for the Court of Appeal.[181] Justice Clark held that counsel's submission that the court should inquire about whether "extrinsic information Juror #14 gained from visiting these sites had an impact upon the jury's verdict" would violate the Supreme Court of Canada's direction in *Pan* and *Sawyer*, namely that "jurors may not testify about the effect of anything on their or other jurors' minds, emotions or ultimate decision."[182] However, the court held that the juror could not have gained much insight from his activities anyways, because there was "copious evidence … concerning the physical environs of both locations" and the main issues in the case were identity and planning and deliberation.[183]

Conversely, in *R. v. Ampadu*,[184] a mistrial was granted in a manslaughter trial where one juror did his own investigation into defence counsel, how an accused surrendered to police, and the physical layout of the crime scene.[185] The juror shared his findings and a map he created with a specialized computer program with other jurors.[186] After consulting counsel about the questions to be put to the jurors, Justice DiTomaso conducted a s. 644 inquiry with a number of jurors. He concluded that actual prejudice was caused by the juror's attendance at the crime scene and creation of a map which he discussed with fellow jurors, including his opinion that some of the evidence at trial was inaccurate about the physical layout of the scene.[187] The positioning of the

[178] *Bains and Pannu*, at para. 112.
[179] 2019 ONSC 5466.
[180] *Shaw*, at para. 3.
[181] *Shaw*, at para. 4.
[182] *R. v. Pan; R. v. Sawyer*, 2001 SCC 42, [2001] 2 S.C.R. 344, at para. 77.
[183] *Shaw*, at paras. 9, 12.
[184] 2018 ONSC 2797.
[185] *Ampadu*, at paras. 3-5.
[186] *Ampadu*, at paras. 3-5.
[187] *Ampadu*, at paras. 164, 186.

parties was a core issue in the trial as it was relevant to the modes of participation.[188] Given that the extrinsic information cast doubt on the evidence called at trial, "[insinuating] into the narrative an alternative version of facts", it had a "corrosive effect which irreparably [damaged] trial fairness."[189]

XVI. Conclusion

The law of jury selection and management in Ontario is complex and cumbersome. There are intersecting statutory procedures and principles of case law that further complicate the process. We hope that this paper can assist practitioners in identifying common issues that may arise from the commencement of jury selection to after a verdict has been rendered in order to respond appropriately and in a timely manner.

[188] *Ampadu*, at paras. 184-186.
[189] *Ampadu*, at paras. 184-186.